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In The
Supreme Court of the United States
October Term, 1991

WILLIS SARGENT, WARDEN
ARKANSAS DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

WILBURN A. HENDERSON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE BY THE STATE OF MISSOURI

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QUESTION PRESENTED

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT'S DETERMINATION REGARDING ACTUAL INNOCENCE TO OVERCOME PROCEDURAL DEFAULT IS CORRECT?

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INTEREST OF AMICUS CURIAE

It is apparent from the cases that have been discussed in the petition for writ of certiorari filed by the State of Arkansas and the cases to be discussed in this brief, that the issue of how the "probable actual innocence" exception to the "cause" requirement of this Court's procedural default jurisprudence applies to the guilt-phases of capital sentencing proceedings is in need of clarification by this Court. The interest of the State of Missouri is founded on the fact that the United States Court of Appeals for the Eighth Circuit is considering several habeas corpus cases involving guilt-phase allegations that are subject to adequate and independent state procedural bars.

The State of Missouri's interest is both substantial and continuing.

SUMMARY OF THE ARGUMENT

In the case at bar, the United States Court of Appeals for the Eighth Circuit has affirmed the grant of a writ of habeas corpus to respondent, Wilburn A. Henderson. In so doing, the court has misapplied the "probable actual innocence" exception to this Court's procedural default jurisprudence. The court's application of this very powerful doctrine is inconsistent with opinions from this Court and other Circuit Courts of Appeals. Certiorari review is necessary, in this case, to establish an objective exception for use in federal habeas corpus actions.

ARGUMENT

I.

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT'S DETERMINATION REGARDING ACTUAL INNOCENCE TO OVERCOME PROCEDURAL DEFAULT DOES NOT COMPORT WITH THIS COURT'S PROCEDURAL DEFAULT JURISPRUDENCE.

Respondent, Wilburn A. Henderson, was convicted of murdering a Fort Smith, Arkansas furniture store owner during a robbery. Respondent was sentenced to death by a jury. The Supreme Court of Arkansas affirmed Henderson's judgment of conviction and sentence of death. **Henderson v. State**, 279 Ark. 414, 652 S.W.2d 26 (1983). This Court denied certiorari review. **Henderson v. Arkansas**, 464 U.S. 1012 (1983).

Henderson was then denied relief pursuant to Arkansas Rule of Criminal Procedure 37. **Henderson v. State**, 281 Ark. 406, 664 S.W.2d 451 (1984). Thereafter, respondent petitioned the United States District Court for Eastern District

of Arkansas for a writ of habeas corpus. The district court granted relief on allegations of ineffective assistance of counsel during both the guilt and sentencing phases of respondent's bifurcated criminal trial.

Petitioner appealed that determination to the Eighth Circuit Court of Appeals, which initially affirmed the granting of habeas corpus relief on the guilt-phase claim. **Henderson v. Sargent**, 926 F.2d 706, 707 (8th Cir. 1991).[1] The court noted the guilt-phase claim was procedurally defaulted in the Arkansas courts but that respondent could overcome the default because he was able to demonstrate both cause and actual prejudice. Id., at 708-713. The Eighth Circuit found the respondent had demonstrated legally sufficient "cause" because he had recieved ineffective assistance of post-conviction counsel. Id., at 712[5]. After finding cause to

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[1] The Court of Appeals stated it would not "reach the penalty phase claim." **Henderson v. Sargent**, 926 F.2d at 707.

overcome the default, the court did not need much time to find actual prejudice. Id., at 712-713 ("[h]aving found cause, the question of prejudice need not detain us long").[2]

Finally, and most importantly for the purposes of the petition for writ of certiorari, the court also found the procedural default could be excused because respondent had demonstrated that he was probably actually innocent of the charge of capital murder. Id., at 713-714. In the initial opinion, filed February 19, 1991, this finding was only dicta. It was not until the granting of rehearing in part by the panel, **Henderson v. Sargent**, 939 F.2d 586 (8th Cir. 1991), that the dicta became the holding upon which relief was granted. In granting rehearing in part, the court, relying on the

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[2] Although amicus feels that the court also misapplied the actual prejudice test, see **United States v. Frady**, 456 U.S. 152 (1982), that issue will not be discussed as the determination is insignificant because the Eighth Circuit vacated its finding of cause in light of **Coleman v. Thompson**, 111 S.Ct. 2546 (1991). See **Henderson v. Sargent**, 939 F.2d 586 (8th Cir. 1991).

intervening opinion of this Court in **Coleman v. Thompson**, 111 S.Ct. 2546 (1991), vacated its previous finding of cause. **Henderson v. Sargent**, 939 F.2d at 586.

The determination of the Eighth Circuit regarding "probable actual innocence" does not comport with the decisions of this Court on that issue. The opinion also is significant in that it is a major portion of what now is a real conflict in application of this test in the courts of appeals. Compare **Henderson v. Sargent**, 926 F.2d at 713-714 with **Johnson v. Singletary**, 938 F.2d 1166 (11th Cir. 1991)(en banc). This Court should accept certiorari review of this case to provide further guidance to the federal courts as to the limited nature of the "probable actual innocence" exception to the cause requirement of **Wainwright v. Sykes**, 433 U.S. 72 (1977). **Dugger v. Adams**, 489 U.S. 401, 410, n.6 (1989); **Murray v. Carrier**, 477 U.S. 478, 496 (1986). This case also provides this Court with an excellent opportunity to resolve the very real conflict between the circuits in

discussing this exception.[3]

Very recently, in **Sawyer v. Whitley**, 112 S.Ct. ___, No. 91-6382 (U.S. Nov. 14, 1991), this Court granted certiorari review on a question involving the application of the probable actual innocence exception to the sentencing phase of a capital murder proceeding. The present case would make an excellent companion case for review. By accepting this case, the Court could concisely address the probable actual innocence exception as it applies to both sentencing proceedings, **Sawyer**, and guilt proceedings, **Henderson**.

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[3] In addition to the conflict mentioned above, a conflict has developed in the circuits regarding application of the probable actual innocence test to the sentencing proceeding of a capital murder proceeding. Compare **Johnson v. Singletary**, 938 F.2d at 1185-1186 and **Sawyer v. Whitley**, 945 F.2d 812, 820 (5th Cir.), cert. granted 112 S.Ct. ___, No. 91-6382 (U.S. Nov. 14, 1991) with **Deutscher v. Whitley**, ___ F.2d ___, Nos. 88-2552, 88-2579 (9th Cir., October 15, 1991) and **Stokes v. Armontrout**, 893 F.2d 152, 156 (8th Cir. 1989), stay denied, 110 S.Ct. 2162 (1990). By accepting this case and considering it in tandem with **Sawyer**, supra, the Court can tailor narrow definitions of the exception which would apply equally to the guilt and sentencing phases of criminal proceedings.

The Application of Probable Actual Innocence to Excuse an Adequate and Independent State Procedural Default

In 1977, this Court expanded on its holding in **Francis v. Henderson**, 425 U.S. 536 (1976), determining that a federal constitutional allegation brought in a habeas corpus petition pursuant to 28 U.S.C. Section 2254 could not be considered on its merits if the petitioner had not provided the appropriate state court with an opportunity to correct the constitutional violation. **Wainwright v. Sykes**, 433 U.S. 72 (1977). Under that circumstance, the Court determined that it would be the petitioner's obligation to demonstrate sufficient cause and actual prejudice to overcome the resulting procedural bar if review on the merits was to occur. Id., at 87, 90-91.[4]

The two-part test of **Francis** and **Sykes** significantly

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[4] See also **Davis v. United States**, 411 U.S. 233 (1973) (establishing the "cause and actual prejudice" test for federal prisoners litigating under 28 U.S.C. Section 2255).

modified the previous "deliberate bypass" standard of **Fay v. Noia**, 372 U.S. 391 (1963).[5] It relieved the burden of the state's to demonstrate that a petitioner's claim was procedurally defaulted and correctly placed that burden on the criminal inmates. The **Sykes** standard also eliminated **Fay's** "presumption in favor of federal habeas review of claims procedurally defaulted in state court." **Coleman v. Thompson**, 111 S.Ct at 2562.

Later, in **Engle v. Isaac**, 456 U.S. 107 (1982), it was noted "that the cause and prejudice standard will be met in those cases where review of a state prisoner's claim is necessary to correct a 'fundamental miscarriage of justice.'" **Coleman**, 111 S.Ct. at 2564, quoting **Engle v. Isaac**, 456 U.S. at 135. The fundamental miscarriage of justice standard was again discussed in **Murray v. Carrier**, 477 U.S. 478

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[5] The **Fay** standard of deliberate bypass was expressly overruled in this Court's last term. **Coleman v. Thompson**, 111 S.Ct. 2546, 2564-2565 (1991).

(1986), when the Court noted the exception to the "cause" requirement should come into play only "in an extraordinary case." Id., at 496;[6] **Dugger v. Adams**, 489 U.S. at 410, n. 6; see also **Harris v. Reed**, 489 U.S. 255, 270-271 (1989)(O'Connor, J., concurring)(limiting this exception to the status of a "'safety valve' for the 'extraordinary case' where a substantial claim of factual innocence in precluded by an inability to show cause").

This Court has not formulated any precise definition allowing for consistent application of this very powerful exception. See **Johnson v. Singletary**, 938 F.2d at 1189

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[6] In **Carrier**, the exception was articulated as follows:

> where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.

Murray v. Carrier, 477 U.S. at 496; see **Smith v. Murray**, 477 U.S. 527, 538-539 (1986); **Harris v. Reed**, 489 U.S. 255, 270-271 (1989)(O'Connor, J., concurring).

(Tjoflat, C.J., concurring in part, dissenting in part)("[a]ctual innocence is not, on its face, a completely clear concept, even in the guilt/innocence context").[7] This is an area needing attention from this Court.

The Probable Actual Innocence Exception as Applied in the Eighth Circuit

As the instant case illustrates, the exception is applied by the Eighth Circuit in more than the "extraordinary case." Since this Court's writings on the exception in **Engle** and **Carrier**, state prisoners have been found probably actually

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[7] Several courts have suggested that the most revealing discussion from this Court came in **Kuhlmann v. Wilson**, 477 U.S. 436, 454 (1986)(plurality opinion). **Johnson v. Singletary**, 938 F.2d at 1184 (majority opinion); id., at 1189 (Tjoflat, C.J., concurring in part, dissenting in part); id., at 1196 (Anderson, J., concurring in part, dissenting in part); **Sawyer v. Whitley**, 945 F.2d at 816-817. **Kuhlmann** was a successive petition case under 28 U.S.C. Section 2254, Rule 9(b) and the plurality termed the exception as one based upon a "colorable showing of factual innocence." **Kuhlmann**, 477 U.S. at 454. It appears that the test of **Kuhlmann** is compatible with the "probable actual innocence" test. See **McCleskey v. Zant**, 111 S.Ct. 1454, 1470-1471 (1991)(discussing **Kuhlmann** in the same context as **Murray v. Carrier**).

innocent of the crime or sentence in at least four cases. **Henderson v. Sargent**, 926 F.2d 706 (8th Cir.), reh'g granted in part 939 F.2d 586 (8th Cir. 1991); **Pilchak v. Camper**, 935 F.2d 145 (8th Cir. 1991); **Jones v. State of Arkansas**, 929 F.2d 375 (8th Cir. 1991); and **Bliss v. Lockhart**, 891 F.2d 1335 (8th Cir. 1989).

Interestingly, two of the opinions have been authored by the Chief Judge of the Court. See **Henderson** and **Jones**. It is readily apparent that Chief Judge Lay's view of probable actual innocence is at odds with this Court's discussions in **Engle**; **Carrier**; and **Smith**. The Chief Judge has not been shy with his discussion of the exception. See Lay, The Constitution, the Supreme Court, and Mr. Meese: Habeas Corpus and the Doctrine of Original Intent, 4 Det.C.L.Rev. 983 (1986). In that article Judge Lay remarked that "[o]ne positive step occurred last term in **Murray v. Carrier**, when Justice O'Connor suggested that a state prisoner who asserts innocence in his claim will not be hampered by the

procedural requirements barring federal court review of the merits of this case." Id., at 991. Judge Lay has also voiced his opinion in the judicial arena. **Fairchild v. Lockhart**, 900 F.2d 1292, 1299 (8th Cir.)(Lay, C.J., dissenting from denial of petition for rehearing en banc), cert. denied, 111 S.Ct. 20 (1990); **Gilmore v. Armontrout**, 867 F.2d 1179, 1180 (8th Cir.)(Lay, C.J., dissenting from denial of petition for rehearing en banc), cert. denied, 490 U.S. 1114 (1989); **Stokes v. Armontrout**, 901 F.2d 1460 (8th Cir.)(Lay, C.J., dissenting from denial of petition for rehearing en banc), stay denied, 110 S.Ct. 2162 (1990); **Byrd v. Delo**, 942 F.2d 1226, 1233-1234 (8th Cir.)(Lay, C.J., dissenting from denial of petition for rehearing en banc), stay denied, 112 S.Ct. 17 (1991).

A close review of the chief judge's writings reveals that Chief Judge Lay is applying more a of "fundamental fairness" test in his determinations. This revelation is evidenced by the judge's comments to Congress on the

proposed habeas corpus legislation recently drafted. In discussing his feelings on the determination of successive petitions, Judge Lay opined:

> Second, the proposal indicates that a constitutional attack on the process at trial must include a claim of factual innocence. Here again, proof of a fundamental constitutional defect in the trial or sentencing should suffice as a basis for a successive petition, without need to also cast doubt on the jury's determination of guilt. It is not clear what federal interest is served by interposing a procedural bar to defeat the right of an inmate who is able to show a constitutional defect in his trial or sentencing.

Lay, Statement of Chief Judge Donald P. Lay, Eighth Circuit Court of Appeals, Before the Senate Judiciary Committee In Re: Habeas Corpus Reform in Capital Cases, 19 Cap.U.L.Rev. 659, 668 (1990)(emphasis added).[8] While the comments were directed toward successive litigation, it is apparent the thoughts take a high priority in Judge Lay's determination of initial petitions. **Henderson v. Sargent**, 926

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[8] Hereinafter referred to as "Statement."

F.2d at 713-714.

Judge Lay's test is akin to that discussed by Justice Stevens in his dissenting opinion in **Smith v. Murray**, 477 U.S. 527, 541-544 (1986)(Stevens, J., dissenting).[9] That view was expressly rejected by the majority. **Smith**, 477 U.S. at 538-539. In a similar fashion this Court should accept certiorari review of this case and reject Chief Judge Lay's disguised "fundamental fairness" analysis present in this case and others.

Pragmatically, the exception is extremely unworkable in habeas corpus actions. As was shown supra, the Eighth Circuit has had a difficult time in applying what would be an

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[9] In actuality, Judge Lay's analysis and comments appear to be even broader than those expressed by Justice Stevens in **Smith**. Judge Lay would apply the test to any apparent constitutional violation, even those barred by the dictates of cases such as **Stone v. Powell**, 428 U.S. 465 (1976). Judge Lay has interpreted **Smith v. Murray**, supra, as stating "if the claims ... affected the guilt determination or undermined the sentencing process in an unconstitutional manner" they would have to be reviewed on their merits. See Statement, 19 Cap.U.L.Rev. at 665, 668.

objective use of the exception. **Pilchak v. Camper**, 935 F.2d at 149. In fact, in **Pilchak** the court was so determined to grant relief that after overlooking the cause and actual prejudice analysis of **Sykes**, it cautioned readers that the opinion should not be cited as precedent allowing an "end run around the cause-prejudice requirements enacted by the Supreme Court and this opinion should not be considered precedent for such an approach." Id., at 149.

Chief Judge Lay has had no problem using the case as precedent. **Byrd v. Delo**, 942 F.2d at 1233.[10] The writing is

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[10] In **Byrd**, the judge who authored the panel opinion (Circuit Judge Arnold) and the judge who authored the **Pilchak** opinion (Circuit Judge Beam) joined in a statement concurring in the denial of rehearing en banc. **Byrd**, 942 F.2d at 1234-1235. In that statement, the judges suggested that the difference between the **Pilchak** and the **Byrd** cases was the difference in the number of constitutional claims. **Byrd**, 942 F.2d at 1234-1235. Even this analysis appears to be one of "fundamental fairness" and not a true application of the probable actual innocence exception. A second distinction listed is that the constitutional violation in **Pilchak** led to the imposition of a sentence that would not otherwise have been imposed. Id., at 1234. Again, such analysis appears to be based on "fundamental fairness."

on the wall that the **Pilchak** opinion will be developed as valid authority in the Eighth Circuit. This erroneous application of the probable actual innocence exception should be preempted immediately.

Other Circuit Courts of Appeals have also had a difficult time applying the exception. In **Johnson v. Singletary**, 938 F.2d at 1175-1183, 1185-1186, the Eleventh Circuit considered the exception. Id. The majority of the court struggled to develop a workable application of the exception. Id. The case provided five dissenting votes. Id., at 1186 (Tjoflat, C.J., concurring in part, dissenting in part); id., at 1196 (Anderson, J., concurring in part, dissenting in part, joined by Kravitch, Johnson and Clark, JJ.).[11] The **Johnson**

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[11] Judge Anderson relied on Eighth Circuit cases, including the case at bar, in developing his dissent to the non-application of the exception. **Johnson**, 938 F.2d at 1199, citing **Stokes v. Armontrout**, 893 F.2d 152, 156 (8th Cir. 1989), stay denied, 110 S.Ct. 2162 (1990); **Smith v. Armontrout**, 888 F.2d 530, 545 (8th Cir. 1989), stay denied, 110 S.Ct. 830 (1990); **Henderson v. Sargent**, 926 F.2d 706 (8th Cir. 1991).

case alone demonstrates that the exception borders on being unworkable. Judge Anderson even noted that in over 100 cases which had considered the exception since **Smith v. Murray** was decided, "[m]ost ... have merely concluded in a rather summary manner that the miscarriage of justice standard was not satisfied." **Johnson**, 938 F.2d at 1199 (Anderson, J., concurring in part, dissenting in part).

In **Hollis v. Davis**, 941 F.2d 1471 (11th Cir. 1991), the court discusses as interchangable the prejudice standards of **United States v. Frady**, 456 U.S. 152, 170 (1982), the **Strickland** standard, **Strickland v. Washington**, 466 U.S. 668, 694 (1984) and the probable actual innocence standard of **Murray v. Carrier**, 477 U.S. at 495. See **Hollis v. Davis**, 941 F.2d at 1483. The unworkability of the exception is seen in other writings. See **Deutscher v. Whitley**, ___ F.2d ___, Nos. 88-2552, 88-2579 (9th Cir. Oct. 15, 1991); **Sawyer v. Whitley**, 945 F.2d 812, 820 (5th Cir.), cert. granted 112 S.Ct. ___, No. 91-6382 (U.S. Nov. 14, 1991).

Perhaps this Court should re-evaluate whether the exception should be available under any circumstance. In most instances, individual states have procedures available for granting relief if the inmate can demonstrate that he is probably actually innocent of the charges or sentence. This remedy would lie, generally, through the use of some form of executive clemency. See generally Mo.Const. art. IV, section 7; Mo.Rev.Stat. sections 217.800, 552.070, 549.010 et. seq. (1986); Ark.Const. art. 6, section 18; Ark.Stat.Ann. section 16-93-204 (1991 Cum.Supp.); Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners 76 Harv.L.Rev. 441, 525-526 (1963).

The executive remedy works in practice as well as in theory. Recently, Governor L. Douglas Wilder of the State of Virginia granted an executive pardon to Joseph M. Giarratano. See The New York Times, February 20, 1991, at 16, col. 4; The Wall Street Journal, February 20, 1991, at 4, col. 2. Mr. Giarratano, at the time of the pardon, had

completed the entire litigation process and was nearing execution.[12] If Mr. Giarratano would have had an incentive to utilize executive remedies prior to the more "traditional" judicial remedies, much time and expense may have been better spent. This aspect is best demonstrated, perhaps, by the litigation of William Neal Moore. After several years of litigation--including at least five decisions by this Court in federal habeas corpus actions--Mr Moore was granted clemency by the State of Georgia Board of Pardons and Paroles. See The New York Times, August 22, 1990, at 1, col. 2. Again much in the way of judicial time and resources were expended in deciding Mr. Moore's initial allegations.

This Court should take this opportunity to discuss the scope and application of executive remedies as a very viable alternative to the probable actual innocence exception.

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[12] This Court is familiar with Mr. Giarratano. **Murray v. Giarratano**, 492 U.S. 1 (1989).

Application of the Exception to Respondent's Case

The application of the probable actual innocence exception to respondent's habeas corpus litigation is the primary focus of the petition for writ of certiorari filed in this case by petitioner. Amicus curiae will defer to the discussion presented in the petition. It should be clear, though, that the United States Court of Appeals has applied a "fundamental fairness" exception in this case.

The powerful probable actual innocence exception to an independent and adequate state procedural default is receiving ever-broadening application in the Circuit Courts of Appeals. This Court should use this case, in conjunction with **Sawyer v. Whitley**, supra, to provide objective guidance on this exception--with respect to both guilt and sentencing proceedings--to the federal bench. This Court should grant the petition and issue a writ of certiorari to the Eighth Circuit.

CONCLUSION

WHEREFORE, for the reasons stated in the petition for writ of certiorari and in this amicus brief, a writ of certiorari should be issued to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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